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INVESTIGATING RAPE: HUMAN RIGHTS AND POLICE ACCOUNTABILITY

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ABSTRACT

This article explores the implications of *D v Commissioner of Police for the Metropolis* [2016] QB 161, a recent decision of the Court of Appeal in which two victims of a serial rapist successfully sued the Metropolitan police for investigative failures relying on Article 3 of the European Convention of Human Rights and the Human Rights Act 1998. The article reflects upon the extent to which English Courts are willing to recognise a duty to investigate within the wider context of civil claims against the police, particularly with regard to failures arising from the investigation of crimes of sexual and domestic violence. The comparative scope of tort and human rights claims is also considered along with the evolving jurisprudential trend towards drawing a firm line between the two kinds of claim.

KEY WORDS

Human rights, duty to investigate, police, rape, tort

INTRODUCTION

For some time now, the question of police attitudes to and conduct of rape complaints has been in the British public eye. A damning succession of studies[1] has catalogued police failings, from initial reporting through to final disposition of a case, generating a mountain of data evidencing deep structural, institutional, and cultural problems going to the heart of the effectiveness of the criminal justice system. Located within a broader policy context of growing concern over conviction and/or attrition rates for rape[2] and set against a backdrop of substantial rape law reform, not just in England and Wales but around the globe, police handling of rape investigations has attracted repeated criticism and public scrutiny. Prominent concerns emerging from the extensive literature include a sustained culture of suspicion directed at complainants, poor record-keeping, widespread misuse of 'no-criming', sloppy witness follow-up and evidence-gathering, and lack of adequate senior officer

[1] G Chambers & A Millar *Investigating Sexual Assault* (Edinburgh: Scottish Office Central Research Unit, 1983); I Blair *Investigating Rape: A New Approach for Police* (London: Croom Helm/ The Police Foundation, 1985); J Harris & S Grace *A Question of Evidence: Investigating and Prosecuting Rape in the 1990s* (London: Home Office, 1999); J Gregory & S Lees *Policing Sexual Assault* (London: Routledge, 1999); Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Inspectorate *Joint Inspection into the Investigation and Prosecution of Rape Offences in England and Wales* (London: HMCPSI and HMIC, 2002); HMCPSI *Without Consent: A Report on the Joint Review of the Investigation and Prosecution of Rape Offences* (London: HMCPSI and HMIC, 2007); HMCPSI *Forging the Links: Rape Investigation and Prosecution: A Joint Inspection by HMIC and HMCPSI* (London: HMCPSI and HMIC, 2012); A Feist, J Ashe, J Lawrence, D McPhee, & R Wilson *Investigating and Detecting Recorded Offences of Rape.* London: Home Office Online Report 18/07 http://webarchive.nationalarchives.gov.uk/20110218135832/http:/rds.homeoffice.gov.uk/rds/pdfs07/rdsolr1807.pdf (last accessed 12th April 2016); V Stern *A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (London: Home Office, 2010); K Hohl & E Stanko 'Complaints of Rape and the Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12 *European Journal of Criminology* 324; and E Angiolini *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (http://www.cps.gov.uk/publications/equality/vaw/dame_elish_angiolini_rape_review_2015.pdf, last accessed 16th November 2015).

[2] During the early 2000s, the conviction rate in rape cases became the focus of intense public scrutiny as figures revealed that only about 6% of reported rapes resulted in a rape conviction: L Kelly, J Lovett & L Regan *A Gap or a Chasm: Attrition in Reported Rape Cases.* Home Office Research Study 293 (London: Home Office, 2005). As a proportion of cases reported, the conviction rate has continued to hover troublingly around 6-7% although more recently, the accuracy and significance of the '6%' figure has been questioned on the grounds that it relies on inappropriate measures and comparisons yielding misleading results: Stern, above n 1. Subsequent studies have sought to ensure greater commensurability in data calculations and few doubt that a serious problem of attrition exists in rape cases, ie that a troubling high proportion of cases fall out of the criminal justice system at all stages. Much ink has been spilled trying to ascertain the reasons for this falling off of claims: see most recently Ministry of Justice and the Home Office (MOJHO) *An Overview of Sexual Offending in England and Wales* (London: Ministry of Justice, Home Office and Office for National Statistics, 2013). The potential scale of the problem is further amplified when one considers that the number of reported cases is likely only a fraction of the number of actual incidents in any given year: *ibid*, Ch 2.

supervision.[3] Time and time again, the public is reassured that lessons have been learned, mistakes corrected, policies put in place, and specialist training undertaken only to have hopes dashed by yet another statistic, study, or public outcry. One cannot but despair at the seeming intractability of the problem. What does it take to bring about the transformative cultural and institutional changes clearly required?

To date, consideration of this issue has generally taken place within the context of criminal justice reform and policy. The focus of this article is otherwise; its purpose to explore the role civil justice might play in navigating this tricky terrain. Could civil claims against the police provide a means of calling individual police actors to account for their poor handling of rape complaints as well promoting positive change in police practices? The idea of using civil litigation to prompt changes in policing is not new. A growing, multi-jurisdictional literature has emerged exploring the merits of civil litigation against the police, both as a mechanism of accountability and catalyst for change.[4] This literature charts the rise of civil litigation against the police from the second half of the twentieth century,[5] its general merits and effects,[6] and the role of activist and practitioner networks - coalescing around issues of race and gender in particular - in shaping the changing landscape of police liability.[7] While jurisdictions differ as to the conditions and scope of liability, there is increasing acknowledgment of the regulatory potential of civil actions within the broad and complex framework of accountability mechanisms governing policing and an emerging consensus

[3] See eg HMCPSI Report 2012 and Angiolini, above n 1.

[4] B Dixon & G Smith, 'Laying Down the Law: the Police, the Courts and Legal Accountability' (1998) 26 *International Journal of Sociology of Law* 419; C Epp *Making Rights Real: Activists, Bureaucrats and the Creation of the Legalistic State* (Chicago: University of Chicago Press, 2009); C Harlow, 'Damages and Human Rights' (2004) New Zealand L Rev 420; K Horsey, 'Trust in the Police? Police Negligence, Invisible Immunity and Disadvantaged Claimants' in J Richardson & E Rackley (eds) Feminist Perspectives on Tort Law (Routledge 2012 80); L Hoyano, 'Policing Flawed Police Investigations: Unravelling the Blanket' (1999) 62 Modern L Rev 912; J McCulloch and D Palmer, *Civil Litigation by Citizens against Australian Police between 1994 and 2002* (Canberra Australia: Criminology Research Council, 2005); J Ransley, J Anderson, & T Prenzler 'Civil Litigation against Police in Australia: Exploring its Extent, Nature and Implications for Accountability' (2007) 40 *Australian and New Zealand Journal of Criminology* 143; E Sheehy (ed) *Sexual Assault in Canada: Law, Legislation and Women's Activism* (Ottowa: University of Ottawa Press, 2012); G Smith, 'Actions for Damages against the Police and Attitudes of Claimants' (2003) 13/4 *Policing & Society* 413.

[5] Smith; McCulloch & Palmer; Ransley et al (above n 4).

[6] Compare eg R Clayton & H Tomlinson, *Civil Actions Against the Police* 3rd ed (London: Sweet & Maxwell, 2005) 6-17, adopting a sceptical approach to civil actions as a mechanism of police accountability and control with Epp, above n 4, offering a far more positive assessment of the same; for a summary of the mixed views reflected in the literature, see McCulloch & Palmer, above n 4, 84-90 and for analysis of reasons for resorting to litigation, see Smith above n 4.

[7] Epp, above n 4 (focusing on race); Sheehy, above n 4 (highlighting gender, and in particular rape).

that rising levels of litigation reflect a lack of public confidence in other mechanisms of redress, bureaucratic or political.[8]

At first glance, however, scope for the deployment of civil remedies in English law to counter police investigative failures looks decidedly limited. As any tort lawyer will confirm, the English judiciary has traditionally adopted an unsympathetic stance towards civil claims derived from the public duty the police owe to preserve the peace by investigating and suppressing crime.[9] This restrictive stance emanates from a decision of the House of Lords in 1989. In *Hill v Chief Constable of West Yorkshire Police*,[10] the police were unsuccessfully sued for failings relating to the investigation and apprehension of the Yorkshire Ripper, a notorious serial killer preying on women in the North of England during the 1980s. Denying the police owed a duty of care to Jacqueline Hill, the last victim of the Yorkshire Ripper and on whose behalf her family brought a claim, the House of Lords held that the relationship between Jacqueline and the West Yorkshire police was insufficiently proximate to give rise to a duty of care: she was but one of a large class of potential victims at risk of harm from the Ripper. Their Lordships also took the view that public policy considerations militated against recognition of a duty of care. In particular, the imposition of civil liability on the police for failing to protect members of the public from injuries inflicted by unknown criminal third parties risked 'significantly divert[ing] police manpower and attention from their most important function, that of the suppression of crime'.[11]

Repeated efforts have since been made to open the avenue of liability shut down in *Hill*[12]; these for the most part have failed, certainly in relation to claims against the police,[13] and a

[8] See eg Clayton & Tomlinson, above n 4, 15; McCulloch & Palmer, above n 4, 90 and Smith, above n 4, 419-420.
[9] The existence and content of this public duty is stated by Viscount Cave LC in *Glasbrook v Glamorgan CC* [1925] AC 270 in the following terms: '… there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, for protecting property from criminal injury' (at 277). See also *Michael v Chief Constable of South Wales* [2015] UKSC 2 at [29-35] per Lord Toulson.
[10] [1989] 1 AC 53.
[11] *Ibid*, per L Keith at 63.
[12] See eg *Osman v Ferguson* [1993] 4 ALL ER 344 (CA); *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24; *Van Colle v Chief Constable of Hertfordshire Police; Smith v Chief Constable of Sussex Police* [2008] UKHL 50.
[13] A rare exception is *Swinney v CC Northumbria Police* [1996] 3 All ER 449 in which a duty of care was recognised on the ground that the police had assumed responsibility for the safety of the claimant, a police informer in a murder investigation.

restrictive judicial position has recently been reaffirmed by the Supreme Court in *Michael v Chief Constable of South Wales*,[14] a tragic case of domestic violence in which a young mother died following a police failure to respond promptly to her emergency 999 call. In *Michael*, a strong commitment to the 'core principle in *Hill*'[15] - is reiterated and the majority of the senior judiciary adhere staunchly to the view that the public duty of the police to preserve the peace does not - and should not - carry with it any private duty of care owed to individuals other than in the most carefully circumscribed circumstances.[16] The received wisdom post-*Michael* is that negligence actions against the police for failures pertaining to their investigative and crime-suppressing functions are unlikely to get beyond a striking out application.

Yet, just at the point when the boundaries of tort liability have been narrowly and decisively drawn, another route to suit is emerging, the scope and potential of which remains undetermined. This alternative approach involves the deployment of human rights, specifically the right enshrined in the Human Rights Act 1998 (HRA) to sue a public authority for acting in a way which is incompatible with rights under the European Convention of Human Rights (ECHR). Again, invoking human rights to counter the restrictiveness of judicial determinations regarding the parameters of public authority liability in negligence is hardly novel. In the 1990s, for example, after the decision in *Osman v Ferguson*[17] in which the Court of Appeal expressed itself bound by *Hill* to strike out a claim against the police for failing to protect a family from the violent attentions of a stalker, an application by the Osman family to the European Court of Human Rights (ECtHR) succeeded.[18] The ECtHR held that the judicial application of an 'exclusionary rule' protecting the police from liability in negligence violated Article 6(1) ECHR, the right to a fair hearing, which includes a right to

[14] [2015] UKSC 2.
[15] *Ibid* at [48].
[16] *Ibid.* An interesting shift in *Michael* is the move away from strong reliance on policy to ground the denial of liability in 'common law principle' (Lord Toulson at [116]). The formal position now appears to be that the police owe no private law duty of care capable of giving rise to an action in damages in the context of exercising their functions of investigating and suppressing crime unless there has been a representation by the police amounting to a voluntary assumption of responsibility which has been relied upon by the claimant (at [115]).
[17] *Osman v Ferguson,* above n 12.
[18] *Osman v UK* [1998] ECHR 101.

effective access to the courts.[19] The ECtHR also considered the application of Article 2, the right to life, and, in particular, whether the positive obligation owed by the state to protect that right had been breached. While holding on the facts that it had not, the Court also specified the circumstances in which such a violation might occur:

> It must be established … that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[20]

The subsequent case of *Z v UK*[21] applied this principle to Article 3 (the right not to be subject to torture or inhuman or degrading treatment)[22] holding that a local authority had breached its positive obligation under Article 3 by failing to protect a group of children from severe parental abuse and neglect. From, inter alia, these two cases, a Convention jurisprudence has developed detailing the nature and scope of public authority obligations to secure people's rights under Articles 2 and 3, including obligations vested in the police and other criminal justice actors.[23]

With the advent of the HRA, this jurisprudence acquired new potency in English courts. In *Van Colle v Chief Constable of Hertfordshire Police*,[24] the family of a trial witness shot dead by the accused brought a claim against the police, relying on sections 6 and 7 of the HRA, for breach of their obligation to secure Giles Van Colle's right to life under Article 2 ECHR. The claim was upheld at first instance and by the Court of Appeal, but a further appeal by the

[19] Art 6(1) ECHR: '… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The ECtHR decision on this point was widely criticised and in the later case of *Z v UK* (2002) 34 EHRR 3, the Court acknowledged that its reasoning in *Osman* was based on an 'understanding of the law of negligence which has to be reviewed in the light of clarifications subsequently made by the domestic courts and notably the House of Lords' at [100]. What the Court in *Osman* viewed as an immunity which breached the right of access to the courts and could not be shown to be proportionate, the Court in *Z* viewed as the judicial determination of the extent of application of the duty of care in particular circumstances, giving rise to no Art 6 issue whatsoever.
[20] *Osman v UK*, above n 18 at [116].
[21] *Z v UK*, above n 19.
[22] Art 3 ECHR 'No one shall be subject to torture or to inhuman or degrading treatment'.
[23] See generally A Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004), chapters 2 & 3.
[24] [2008] UKHL 50.

police to the House of Lords was allowed on the grounds that the high threshold for liability set by the ECtHR in *Osman* had not been met, specifically, that from the information available, the police could not reasonably have anticipated a real and immediate risk to the victim's life.[25] The House of Lords thus acknowledged the possibility of a HRA claim against the police for failing to protect crime victims but only in *Osman*-prescribed circumstances. Subsequently, in *Michael v Chief Constable of South Wales*,[26] in which claims were lodged both in negligence and under the HRA, the Supreme Court approved the striking out of the negligence application but allowed the HRA claim to proceed to trial.[27] There have also been instances of cases in which the police have settled claims brought by the families of domestic violence victims based on alleged violation of their Article 2 ECHR rights.[28]

From this one can detect a slim but sturdy thread of English case law linking police failings in relation to the investigation and suppression of crime with positive obligations on the State 'to provide individuals with suitable measures of protection against immediate threats to their lives by third parties'.[29] Can this assist rape victims whose complaints are poorly handled by the police? Into the frame steps *D v Commissioner of Police for the Metropolis*,[30] a recent Court of Appeal decision which may hold some potential to address the multiple concerns raised about the policing of sex crimes. *D* is considered here both on its own merits and within the context of the broader legal framework in which tort and human rights claims appear to be on something of a collision course, at least when it comes to actions against the police. The picture is further complicated by the intention of the current Government to abolish the HRA and replace it with a British Bill of Rights.[31] Can the evolving jurisprudence positing a police duty to investigate survive the anticipated demise of the HRA? Upon what precise basis does the duty lie and what are its limits and scope? Does the imposition of liability in such circumstances provide an effective means of enabling rape

[25] This decision was later upheld by the ECtHR in *Van Colle v UK* (2013) 45 EHRR 23.
[26] [2015] UKSC 2.
[27] Whether or not on the facts *Michael* will be deemed to have met the *Osman* threshold remains to be seen; at least one Court of Appeal judge thought there was no realistic prospect of success (*Michael v Chief Constable of South Wales* [2012] EWCA Civ 981 per at Davis LJ at [35]); the Supreme Court refrained from commenting on this point.
[28] See eg the tragic case of Cassie Hasanovic settled in early 2016, reported here: http://www.doughtystreet.co.uk/news/article/sussex-police-settle-human-rights-claim-following-domestic-homicide
[29] Mowbray, above n 23, 15.
[30] [2016] QB 161(CA).
[31] 'Plans to scrap Human Rights Act delayed again' *The Guardian* 2 December 2015.

victims to call the police to account for egregious investigative failures? Might such litigation-led interventions also help to change institutional behaviour and public attitudes when it comes to the policing of gender-based violence? These questions shape and inform the analysis below.

THE CASE OF THE BLACK CAB RAPIST

D v Commissioner of Police for the Metropolis[32] arose from the actions of a serial rapist, John Worboys, colloquially known as 'the black cab rapist'. Worboys was a licenced London taxi driver who, for the better part of a decade, from 2002 to 2008, preyed upon vulnerable young women looking for a safe ride home after an evening out. Worboys drugged his victims before sexually assaulting them; consequently, their memory was impaired and their account of events often came across as confused. Worboys is thought to have committed well in excess of 100 rapes and sexual assaults during his prolonged crime spree before being arrested and charged in February 2008. In March 2009, he was convicted of 19 criminal counts including rape, sexual assault and offences of administering a substance with intent to rape. He received an indeterminate sentence with a recommendation he serve a minimum of eight years imprisonment.

The claimants, 'D' and 'V',[33] were two of Worboys' victims. D had been assaulted by Worboys in 2003; V in 2007. Both claimants reported their assaults to the police. However, after fairly cursory investigations, neither case resulted in further proceedings until early 2008 when a routine computer check carried out by specialist sexual assault officers identified factual similarities in four recorded allegations, leading, inter alia, to the reinvestigation of D and V's claims. Such was the weight of the evidence when it was finally pursued that Worboys was arrested very quickly. Around the same time the story broke in the media[34] and many more women came forward to report their assaults. By the

[32] [2016] QB 161(CA); *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC).
[33] Also known as 'DSD' and 'NBV' in some reports.
[34] 'Lotto Lie Cabbie Drugs and Rapes 5 – Hunt for Spiked Bubbly Brute' *The Sun*, 15 February 2008.

conclusion of a post-trial report carried out by the Metropolitan Police Service (MPS), 105 separate complaints involving Worboys had been lodged.[35]

D and V sued the police for their investigative failures relying upon the framework of the HRA 1998. In 2014, the High Court upheld claims that in the handling and investigation of D and V's complaints, the MPS had breached their obligation under section 6 of the HRA 1998 not to act in a way which was incompatible with their rights under the ECHR.[36] Specifically, Mr Justice Green held that under Article 3 ECHR, the police owed a duty to investigate to victims of serious crimes of violence perpetrated by private parties which, on the facts before him, had been breached.[37] Unsurprisingly given the novelty of the holding in a British context, the decision was appealed, and in June 2015 the Court of Appeal upheld Green J on all essential points, Lord Justice Laws giving a single judgment on behalf of the Court.[38]

There can be little doubt that the police handling of the Worboys' investigation was woefully inadequate. In the High Court Green J closely examined the facts, identifying

> … a series of systemic failings which went to the heart of the failure of the police to apprehend Worboys and cut short his 5-6 year spree of violent attacks. These failures included (i) a substantial failure on the part of the MPS to train relevant officers in the intricacies of sexual assaults and in particular drug-facilitated sexual assaults [DFSA]; (ii) serious failures … by senior officers to supervise investigations by more junior officers and to ensure that they were conducting investigations in accordance with the standard procedure mandated for DFSA…; (iii) serious failures in the collection and use of intelligence sources to cross-check complaints to see if there were linkages between them; (iv) failure to maintain the confidence of victims in the integrity of the investigative process… (v) failure to allocate proper resources to sexual assaults, including pressure from Borough management to focus resources

[35] *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC) at [87].
[36] HRA 1998, s 6(1): 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'.
[37] *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC), especially at [241, 298 and 312].
[38] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA).

> on other allegations (of a non-sexual nature) that were easier to clear up and a resultant pressure on officers to reject complaints of sexual assault.[39]

Focusing on the particular assaults on D and V, Green J continued:

> In addition to these systemic failures, there were numerous individual omissions in the specific cases of D and V which reflect the wider systemic failings but which, when viewed in isolation, can also be said to be of sufficient seriousness such that had they not occurred the MPS would have been capable of capturing Worboys at a much earlier point in time. These failings included matters such as: failure to interview vital witnesses, failures to collect key evidence, failures to follow up on CCTV; failures to prepare properly for interviews with the suspect etc.[40]

In sum, Green J concluded that the police investigation into Worboys' criminal activities was marred by numerous systemic and operational failings impacting directly on the handling of D and V's complaints.

These are the factual conclusions to which the MPS offered no real dissent. The key question was what, if any, legal consequences flowed from them: had any legally enforceable rights of D and V been violated, any legally enforceable duties owed by the MPS been breached?

IN THE HIGH COURT: THE DUTY TO INVESTIGATE DEVELOPED

As we have seen, existing case law appeared to stand firmly in the way of grounding an enforceable claim against the police in negligence for the consequences of failing adequately to investigate a crime.[41] Perhaps for this reason the claimants based their claim on the HRA, drawing both from Art 3 ECHR and the statutory obligations vested in public authorities under the HRA 1998.[42] This was relatively unexplored territory in a British

[39] *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC) at [13].
[40] *Ibid*.
[41] See text above accompanying nn 10-16.
[42] See HRA 1998, s 6 (1) (above n 36) and also s 7(1): 'A person who claims that a public authority has acted … in a way which is made unlawful by section 6(1) may – (a) bring proceedings against the authority under this Act in the appropriate court or tribunal'; and s 8(1): 'In relation to any act… of a public authority which the

context although the Strasbourg jurisprudence on the application of Articles 2 & 3 ECHR to the conduct of police investigations was considerably more developed. Green J began by stating that the case raised two questions of law, first whether, under the HRA 1998, the police owed a duty to investigate to victims of serious crimes of violence perpetrated by third parties and second, if a duty did exist, whether, on the facts, it had been breached. He ruled affirmatively on both questions, producing a lengthy synthesis of the relevant ECHR case law to support his conclusion that a police duty to investigate in the context of Article 2 and 3 violations was sufficiently well-established in the Strasbourg jurisprudence to warrant its application in a domestic context.

From where or what precisely did this duty to investigate derive? Green J's starting point was *Osman v UK*[43] in which, as we have seen, the ECtHR recognized that the State obligation under Article 2 ECHR (right to life) to take appropriate steps to safeguard the lives of those within its jurisdiction could include a positive obligation 'to take preventative operational measures to protect an individual whose life was at risk from the criminal acts of other parties'.[44] *Osman* thus established that within the framework of Article 2 a State duty arose to protect individuals from serious harm perpetrated by criminal third parties, albeit in tightly prescribed circumstances. This duty was subsequently reiterated in a number of other cases and extended to encompass Article 3 rights in *Z v UK*.[45] It was recognized by the House of Lords as a part of English law in *Van Colle v Chief Constable of Hertfordshire Police; Smith v Chief Constable of Sussex Police.*[46]

How though do we get from a duty to *protect* to a duty to *investigate*? Green J proceeded to show how the developing articulation of the scope of the State's duty to protect implicitly encompassed some minimum requirement of effective official investigation. This implicit requirement was rendered explicit in *Edwards v UK*,[47] in which a vulnerable young man was

court finds is … unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'.

[43] [1998] ECHR 101.

[44] *Osman v UK* [1998] ECHR 101 at [115].

> It must be established … that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (at [116]).

[45] [2001] 2 FLR 612.

[46] [2008] UKHL 50.

[47] [2002] 35 EHRR 19.

killed by a fellow prisoner while in custody. The ECtHR held that Christopher Edwards' Article 2 rights had been violated not just by the State failure to protect his right to life but also because the obligation to protect 'requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force'.[48] This 'procedural obligation', as it is described in *Edwards*,[49] became the primary focus of a detailed exegesis by Green J of the relevant ECHR case law from which he derived the existence of a police duty to investigate 'credible or arguable claims' of torture or degrading or inhuman treatment at the hands of private parties.[50] This included allegations of rape, as exemplified in the case of *MC v Bulgaria*,[51] in which a claim by the applicant rape victim that the Bulgarian authorities had breached her Article 3 and 8[52] rights was upheld by the ECtHR. The substance of MC's claim was that the state had failed to provide effective protection against rape as only cases where the victim had resisted actively were prosecuted; and that they had had failed properly to investigate her rape claim. On the latter point the ECtHR observed:

> In a number of cases Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation. Such positive obligations cannot be considered in principle to be limited solely to cases of ill-treatment by state agents'… [53]

The *MC* Court went on to conclude that 'the effectiveness of the investigation in the applicant's case fell short of the requirements inherent in the State's positive obligations…

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[48] *Edwards v UK* [2002] 35 EHRR 19 at [69]. The Court then went on to observe 'the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life' (*ibid*).

[49] *Edwards v UK* [2002] 35 EHRR 19 at [65].

[50] *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC) at [214]. In addition to the cases mentioned above, Green J considered the following ECtHR decisions: *Menson v UK* [2003] 37 EHRR CD220; *MC v Bulgaria* [2005] 40 EHRR 20; *Szula v UK* [2007] 44 EHRR SE19; *Secic v Croatia* [2009] 49 EHRR 408; *Ali and Ayse Duran v Turkey* App No 42942/08 (8th April 2008); *Beganovic v Croatia* App No 46423/06 (25th September 2009); *Denis Vasilyev v Russia* App No 32704/04 (17th December 2009); *Milanovic v Serbia* App No 44614/07 (14th December 2010); *CAS & CS v. Romania* App No 26692/05 (20th March 2012); *Koky & others v Slovakia* App No 13624/03 (12th June 2012); *Sizarev v Ukraine* App No 17116/04 (17th January 2013).

[51] [2005] 40 EHRR 20.

[52] Art 8 ECHR: 'Everyone has the right to respect for his private and family life…' The right to respect for private life has been interpreted by the ECtHR to include a right to physical integrity and in that sense has been held to encompass sexual violations (*X & Y v Netherlands* A.91 (1985); 8 EHRR 325).

[53] *MC v Bulgaria* [2005] 40 EHRR 20 at [151]. For a contemporaneous analysis of the scope and potential of *MC*, see J. Conaghan, 'Extending the Reach of Human Rights to Encompass Victims of Rape: MC v Bulgaria' 13 *Feminist Legal Studies* (2005) 145.

to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse'.[54]

That some duty to investigate existed, including in relation to rape,[55] thus seemed clear; but what were its parameters? Green J proceeded to draw on the Strasbourg case law to articulate a series of principles governing the precise scope and application of the duty.[56] He stressed, inter alia, that the duty should be understood as an obligation to investigate 'in an efficient and reasonable manner… capable of leading to the identification and punishment of the perpetrator';[57] that it should not be regarded as conditional upon the State being guilty, directly or indirectly, of misconduct itself;[58] that investigative failings which triggered a breach could be systemic (legislative or policy failings) or operational (flawed acts and omissions of individual officers in the course of the investigation);[59] and that the process of determining whether an investigation was 'reasonable' or 'capable of leading to the apprehension, charge and conviction of a suspect is a fact-sensitive exercise'.[60] At the same time, he acknowledged 'the need to avoid an unacceptable burden being imposed on the police', urging a 'cautious approach to the law' which did not 'set [...] the bar for liability at too low a level'.[61] Green J emphasised that the Strasbourg case law on the duty to investigate was 'coherent, well-evolved and its core tenets… settled',[62] placing an obligation on him to accord that body of law significant weight. Nor, he argued, did recognition of a duty to investigate open 'a Pandora's Box of liability', as long as it was applied with appropriate rigour and due regard to ensure that a 'disproportionate burden' did not

[54] *MC v Bulgaria* [2005] 40 EHRR 20 at [185].
[55] According to Green J in *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC), allegations of crime that were 'grave' or 'serious' would amount to torture or degrading or inhuman treatment for purposes of triggering the duty and this encompassed allegations of rape and serious sexual assault (at [215]).
[56] *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC) at [216]. For a detailed elaboration of Green J's core principles, see [211-224].
[57] *Ibid* at [216].
[58] *Ibid* at [213].
[59] *Ibid* at [223].
[60] *Ibid* at [224]. Green J also determined that the police duty to investigate covered the entire span of a case from investigation to trial (at [212]); the duty was one of means not results, ie a breach of duty occurred where the conduct of the investigation fell below the requisite standard, even if it did in fact lead to an arrest, charge and conviction (at [217]); the assessment of the efficiency and reasonableness of an investigation should take account of its 'promptitude' (at [219]), as well as whether the offender was adequately prosecuted (at [220]); not every failing attracts liability particularly if such a failing does not go to the capability of the investigation to lead to the apprehension and prosecution of an offender (at [221]).
[61] *Ibid* at [229 (1)].
[62] *Ibid* at [211].

result.[63] Applying the (now) settled duty to the individual claims of D and V, Green J concluded that in both cases 'multiple, systemic and operational failures' had occurred in the conduct of the investigations which 'individually and collectively' met the test for liability under Article 3.[64] In a later hearing, he went on to award damages of £22,500 and £19,000 to DSD and NBV respectively.

Green J's judgment was widely lauded for its creative assemblage of a jurisprudential basis to support a duty to investigate;[65] but could it stand the scrutiny of appeal?

IN THE COURT OF APPEAL: THE DUTY TO INVESTIGATE UNDER CHALLENGE

The core arguments raised before Green J against the recognition /imposition of a duty to investigate were: first, that if a duty existed, it only applied where the police were directly implicated in the harm alleged, for example, where injuries were sustained while in police custody; second, that insofar as the Strasbourg case law might suggest otherwise, the cases relied upon by the claimants were 'essentially rogue or maverick'[66] and should not be followed; and third, that existing domestic law was not consistent with the proposed duty to investigate. Green J gave all of these arguments fairly short shrift, albeit politely, and there is limited direct engagement with the defendant's arguments in his judgment,[67] the judge preferring to focus his intellectual energies on successfully plotting the extensive Strasbourg case law. This enabled the construction of a clear narrative supporting a duty to investigate while simultaneously countering any contentions that the duty was unsupported by case law.

If a lack of close attention to the defendant's arguments might be regarded as a weakness in an otherwise bold and brilliant first instance judgment, this is undoubtedly corrected in the Court of Appeal where Laws LJ frames his judgment explicitly around the arguments of

[63] *Ibid* at [241].
[64] *Ibid* at [243].
[65] For a detailed analysis of Green J's judgement, see J Conaghan, 'Celebrating Duncan Kennedy's scholarship: a "Crit" analysis of *DSD & NBV v Commissioner of Police for the Metropolis*' (2014) 5 *Transnational Legal Theory* 601.
[66] *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (HC) at [227] which includes a summary of the defendant's main submissions.
[67] *Ibid* at [227-242].

appellant counsel. The judgment is dense and often highly technical. However, from the outset, Laws LJ signals a concern to keep sight of what is really at stake: 'what may be thought of as fundamentals of a civilised constitution: the rule of law, and the security and protection of people'.[68] This sets the tone for a judgment which ultimately eschews doctrinal intricacy in favour of a broad brush, value-affirming approach to the interpretation of ECHR norms. Whether this approach will prove effective in entrenching the duty to investigate in English law remains open to debate.

Let's now take a closer look at the appellant's arguments in *D* and their handling by the Court of Appeal.

(a) Article 3 ECHR does not of itself impose any duty of investigation

This argument essentially challenges the applicability of a duty to investigate in English law. Its starting point lies in the text and construction of the HRA 1998. Those familiar with the Act know that the definition of 'Convention rights', as laid out in s 1(1), specifies 'Articles 2 to 12 and 14 of the Convention' but omits to mention Article 1. This makes complete sense to the lawyer as Article 1 does not confer any substantive human right; rather it imposes a general obligation on States 'to secure … the rights and freedoms defined in … the Convention'. The exclusion of Article 1 from the definition of Convention rights has not until now been viewed as in any way inhibiting the incorporation of ECHR rights into domestic law. Yet the MPS mount an argument claiming precisely this effect. One can spot it lurking in the interstices of Green J's judgment; however, the argument is far more fully fleshed out by Jeremy Johnson QC, lead counsel for the MPS, in the Court of Appeal. The thrust of it is that the police duty to investigate Article 3 violations is, according to the correct interpretation of the relevant case authorities, expressly contingent upon Article 1 so that, in the absence of the inclusion of Article 1 in the HRA, the duty to investigate also falls, at least at a domestic level.[69] To add a further wrinkle of complexity, Mr Johnson draws a distinction between the duty to investigate under Article 2 and under Article 3; the former, it is

[68] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [11].

[69] Mr Johnson relies particularly on the ECtHR judgment in *Assenov v Bulgaria* (1988) 28 EHRR 652 in which the Court observes: '[Art 3] read in conjunction with the State's general duty under Art 1… requires by implication that there should be an effective official investigation' ([102] cited by Laws LJ in *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [13]). As Laws LJ acknowledges, this formulation is also replicated in later cases.

claimed, is not reliant upon Article 1 because the language of Art 2(1) - 'Everyone's right to life shall be protected by law' – is sufficient without more to ground a positive obligation on the State. By contrast, the negative textual construction of Article 3 rights – 'no one shall be subject to torture or to inhuman or degrading treatment…' – requires the aid of Article 1 to support a positive obligation.[70]

This is a somewhat formalistic argument which goes against the grain of ECHR jurisprudence, as Laws LJ is quick to point out.[71] Does it carry weight? It is true that the ECtHR have frequently called upon Article 1 to support the development of positive obligations on the State in relation to Article 3 violations.[72] What is far more contestable is that those obligations are formally contingent upon the operation of Article 1. In a sense, it is not an issue the Strasbourg Court has ever had to confront: Article 1 is plainly there and put to good use. Does its omission from the HRA fatally flaw that piece of legislation so that the extent to which Convention rights enjoy protection under English law is somehow less than the Convention itself confers?

Laws LJ thinks not. Article 1, he argues, does not inform the scope of substantive rights; it merely requires they be secured.[73] On the idea that there might be a 'substantial mismatch' between the scope of Article 3 guaranteed by the Convention and under the HRA he is equally dismissive; the effect he declares would be 'bizarre' and is nowhere evident in previous Supreme Court interpretations of the scope and reach of the HRA.[74] His Lordship highlights the 'clear scheme' of the HRA which distinguishes between substantive rights under the ECHR and those Convention provisions which ensure support for those rights – Article 1 as well as Article 13 (the right to an effective remedy) - pointing to the domestic equivalents in sections 6-8 of the HRA.[75] Effectively, section 6 – imposing an obligation on public authorities not to act in a way which is incompatible with Convention rights – does the same job domestically as Article 1 does internationally and this, Laws LJ concludes,

[70] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [13-14].
[71] *Ibid* at [12].
[72] Mowbray, above n 23, pp 43-65.
[73] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [15].
[74] *Ibid* at [16].
[75] Above, n 42.

surely suffices to explain the omission of Article 1 from the HRA without yielding the 'bizarre' effect for which Mr Johnson contends.

This analysis is surely correct. In addition to the reasons put forward by Law LJ, it is difficult to see how the MPS's argument that the absence of Article 1 from the HRA precludes the imposition of a positive duty to investigate under Art 3 ECHR does not apply to positive duties derived from Article 3 more broadly, for example, the duty to protect recognised in *Z v UK*.[76] This issue is not directly raised by Mr Johnson; nor does Laws LJ confront it; but if we accept that the duties are related, that the duty to investigate is actually derived from the duty to protect, then surely both duties are ensnared by Mr Johnson's argument. Yet the English Courts have acknowledged a positive duty on the State to take steps to protect individuals from Article 3 violations perpetrated by private parties, particularly with regard to local authority failures in the context of child abuse.[77] While some of these decisions are grounded in negligence, they are clearly, and often explicitly, informed by positive obligations under Article 3.[78] In fact, the development of public authority liability in this context precedes the implementation of the HRA but there is little reason to suspect that the introduction of the Act has had the effect – or was intended to have the effect – of curtailing the scope of prior English law, let alone, as Laws LJ protests, creating a remedial regime in which the schematic construction of the HRA dictates a different outcome.

(b) The duty to investigate only applies where the State is complicit in the substantive violation

A central plank of the appellant's argument is that insofar as a duty to investigate is recognised in the Strasbourg jurisprudence, it is confined to cases where the State is directly complicit in the alleged breach, as for example, where ill-treatment occurs at the hands of State agents. Laws LJ does not think a great deal of this argument. Commenting on Mr Johnson's efforts to put this particular spin on the case law, he wryly observes that 'Like

[76] (2002) 34 EHRR 3.
[77] See in particular, *D v East Berkshire NHS Trust* [2003] EWCA Civ 1151; *D v East Berkshire NHS Trust* [2005] UKHL 23.
[78] *Ibid*; see also *E v Chief Constable of Royal Ulster Constabulary* [2008] UKHL 66 (affirming positive obligation on State to protect individuals from infliction by third parties of inhuman or degrading treatment at [44]).

many a counsel of despair, this was imaginative'.[79] As with Green J, Laws LJ views the ECtHR position as unequivocal on this point, supported by a 'clear and constant line of authority'.[80]

He does however give pause to Mr Johnson's suggestion that, regardless of what the Strasbourg position actually is, it should not apply in domestic law. This approach serves as a not-so-subtle reminder that Strasbourg law does not have to be slavishly followed. Laws LJ agrees that the HRA requirement that courts 'take into account' Strasbourg jurisprudence does not elevate ECtHR decisions to the status of binding precedents.[81] At the same time, and echoing Green J on this point, he insists that where the relevant authorities are clear and established, there must be good reason *not* to apply them. Mr Johnson offers certain decisions of the English courts as just such a reason, highlighting three cases which, he maintains, support the view that in a domestic context the Article 3 investigative duty only arises in cases of State complicity.[82] Laws LJ disagrees, again relying on Green J's reasoning at first instance that as the facts of each of the named cases encompass situations where the alleged violence *did* directly or indirectly involve the State, they do not pertain to cases where violence or ill-treatment is inflicted by a private party.[83]

Laws LJ's reading here, both of the Strasbourg and domestic authorities, seems entirely plausible and one does wonder at points why he devotes such considerable time addressing an argument appearing to have so little colour. All three cases cited by Mr Johnson consider the duty to investigate within the context of direct State involvement in alleged breaches of Articles 2 and/or 3, and as both Green J in the High Court and Laws LJ in the Court of Appeal point out, at least one of them, *R(NM) v Secretary of State for Justice,*[84] expressly

[79] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [23].
[80] *Ibid* at [25].
[81] 'I have long thought… that needless difficulty has been caused by the treatment in this jurisdiction of Strasbourg cases almost as if they were domestic law' (*ibid* at [25]). Laws LJ's comments notwithstanding, there are repeated examples in the UK case law of clear judicial recognition that the obligation to take Strasbourg into account requires considerably less than mindless adherence (S Greer & R Slowe, 'The Conservatives' Proposals for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?' (2015) *European Human Rights Law Review* 370, 375).
[82] The key cases upon which the appellants rely are: *R(P) v Secretary of State* [2010] QB 317; *R(Humberstone) v Legal Services Commission* [2011] 1 WLR 1460; and *R(NM) v Secretary of State for Justice* [2012] EWCA Civ 1182.
[83] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [31-37].
[84] [2012] EWCA Civ 1182.

acknowledges a duty to investigate even in the absence of state complicity.[85] What then does appellant counsel see in these cases which might support his position? Certainly, there is clear evidence of judicial caution in the application and development of a duty to investigate in English law and a concern in particular with the resource implications thereof. As Stanley-Burton LJ observes in *R(P) v Secretary of State for Justice*, 'To impose an obligation to hold a human rights enquiry has significant resource implications, a matter of growing concern when the resources of public authorities are constrained'.[86] Similarly, Rix LJ in *N(M)* emphasises the need for a restrictive approach to the application of an investigative duty: 'The investigative obligation, particularly under Article 3, is highly fact-sensitive and subject to resource implications'.[87] This sounds a little like the policy arguments typically invoked to counter negligence claims against the police; mindful of this perhaps, Laws LJ takes the opportunity to engage in a short exegesis of the proper relationship between human rights and the common law.[88] While on the one hand, he expresses the view that, 'as far as possible', the common law and human rights should cohere – 'that neither should undermine the other',[89] on the other hand he appears to endorse the remarks of Lord Brown in *Van Colle v Chief Constable of Hertfordshire Police; Smith v Chief Constable of Sussex Police*[90] that common law based civil actions serve very different functions to those grounded on human rights. As Lord Brown puts it: 'where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended to uphold minimum human rights and to vindicate those rights'.[91] I have never found this argument particularly convincing, reliant as it is on a rather narrow, artificial construction of the scope and function of private law actions. Are such claims never concerned with the vindication of rights?[92] Is compensation of loss the only lens through which such actions

[85] *Ibid* at [209] cited by Green J in the High Court and then by Laws LJ in the Court of Appeal (*D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [34-37]. *Allen v CC of Hampshire Constabulary* [2013] EWCA Civ 967, another authority upon which the MPS relies, also expressly recognises that the investigative duty extends beyond state complicity: 'In principle this [investigative] obligation is not limited to cases of ill-treatment by state agents' (per Gross LJ at [43]).
[86] *R(P) v Secretary of State* [2010] QB 317 at [58].
[87] *R(NM) v Secretary of State for Justice* [2012] EWCA Civ 1182 at [29].
[88] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [26-30].
[89] *Ibid* at [27].
[90] [2008] UKHL 50.
[91] *Ibid* at [138].
[92] Much here hangs on how 'rights' are conceived and understood. For an analysis of the role of rights in tortious obligations, see R Stevens, *Torts and Rights* (Oxford: OUP, 2007).

may be viewed? Jenny Steele is rightly sceptical about the analytical robustness of such statements of functional distinctiveness observing they are 'oversimplified and fail[…] to capture the breadth of functions associated with the law of tort'.[93] Surely, for example, it is an acknowledged function of tort law to deter certain kinds of behaviour (for example, bad policing)?[94] In so far as Laws LJ echoes conventional judicial truths about the relation between tort and human rights, his judgment arguably throws limited light on the compatibility or otherwise of the two regimes.

However, putting these objections to one side, the delicious irony of shutting down civil law avenues of redress for claimants such as D and V via the judicial placing of clear blue water between tort and human rights is that the public policy arguments which have long been prayed in aid to support what amounts in practical terms to a blanket police immunity with respect to its core functions, are equally distanced. They do *not* occupy a central place in judicial deliberations about the scope of the duty to investigate under Article 3. As Laws LJ remarks, rejecting any notion that the scope of liability in negligence should inhibit the scope of liability under Article 3, 'the ECHR and the common law of negligence have different aims and so can live together'.[95] To put it another way (and he does) just as the courts have resisted the view that 'the common law rule should be moderated to accommodate the Convention', so also should they hesitate before asserting that rights under Article 3 should be 'moderated by the force of the common law'.[96] In this sense it might be said that the judicial strategy in *Smith/Van Colle* and *Michael* to protect the police by containing the infectious potential of human rights in relation to common law development has rebounded, leaving human rights jurisprudence free to develop beyond the constraints which the common law has traditionally placed on the scope of police liability.[97]

(c) In so far as a duty to investigate does exist, the MPS did not fall short of it

[93] J Steele 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation' (2008) CLJ 606, 607.
[94] T Honore *Responsibility and Fault* (Oxford: Hart Publishing, 1999) 68.
[95] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [30].
[96] *Ibid*.
[97] This point is further developed in Conaghan, above n 65.

Given the damning facts of this case articulated in such detail by Green J in the High Court, one would be tempted - drawing upon a timeworn cliché - to laugh this argument out of court. If such a woefully mismanaged investigation should fail to meet the test for breach of a duty to investigate, one wonders what sort of investigative failings possibly could. Valiantly though, Mr Johnson runs the argument and Laws LJ gives it no shortage of consideration. The approach adopted by appellant counsel here is commendably clever: Mr Johnson marshals the various threads of Strasbourg and domestic case law to delineate a set of six principles determining different investigative standards depending upon the kind of case before the court. These include, for example, the principle that the obligation to investigate is less extensive in Article 3 than Article 2 cases; it is also less extensive where the perpetrator is a private party rather than a State agent.[98] The claims of D and V, the argument runs, fall within a category of claims in relation to which lesser degree of investigative rigour is required than applied by Green J.

Again there is a tension here between the formalism of appellant counsel and the more holistic, 'big picture' approach adopted by the Court of Appeal. Laws LJ does not deny that these factors feature in the cases considering the investigative duty. However, he resists the conclusion that they should yield different kinds of duty in different contexts. Throughout his judgment he stresses that 'a single principle of protection with varying degrees of rigour according to the gravity of the case… represents the true sense of Article 3'.[99] According to Laws LJ, the scope and extent of the duty to investigate is best understood in terms of a 'sliding scale' in which 'deliberate torture by State officials' is located at the top end and 'the consequences of negligence by non-State agents' occupies the bottom.[100] This more fluid approach, uncontained by categorical boundaries but nevertheless free to gauge the duty to investigate according to context and fact-sensitivity, eschews the rigidity of the categorical approach espoused by Mr Johnson, while accommodating, as Law LJ eloquently puts it, 'the nuance which explains the different voices in which the cases speak'.[101]

[98] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [49].
[99] *Ibid* at [50]; see also [46].
[100] *Ibid* at [45].
[101] *Ibid* at [62]. Commenting in particular on Mr Johnson's efforts to draw a categorical line between Art 2 and 3 cases, Laws LJ remarks that 'the weakness of Mr Johnson's argument is that it seeks to elevate potential practical differences into rigid differences of principle' (at [53]).

What subtext underlies these unusually erudite judicial remarks? Part of Laws LJ's anxiety is undoubtedly flagged at the commencement of his judgment, where he expresses concern that the 'restrictive reading' advocated by the MPS gives insufficient weight to the fundamental issues at stake in the case, that such a reading fails to take account of the 'large canvas' of values and ideal which underpin the ECHR.[102] However, Laws LJ also links his nuanced approach to differences in nature between private common law actions and the protections offered by the Convention. It is precisely because, ultimately, human rights depend upon the overall approach of the State to their protection that they cannot (or should not) be easily reducible to separate elements of a claim in the same way that, for example, the tort of negligence can.[103] In other words, Laws LJ sees the kind of normative fluidity he advocates as an inherent aspect of human rights enforcement. He spells this out as follows:

> These points of departure between the ECHR and the common law are not merely theoretical. They mark important differences in practice… Because the focus of a human rights claim is not on loss to the individual but on the maintenance of a proper standard of protection, the Court is in principle concerned with the State's *overall* approach to the relevant ECHR obligation.[104]

He goes on to observe that the need to accord a margin of appreciation to States in the fulfilment of human rights obligations further illustrates the distinctiveness of human rights as opposed to common law norms:

> … a margin of appreciation is … quite foreign to the adjudication of common law claims: once the court has ascertained what the relevant duty of care requires, its remaining task is to decide whether there has been a breach of duty causing damage. No margin of discretion enters the exercise,[105]

Laws LJ's reflections here go beyond the empty truisms he has previously rehearsed pertaining to differences between tort law and human rights. These amount to a claim which is far more subtle and profound, namely, that there is something in the nature of

[102] *Ibid* at [11].
[103] *Ibid* at [65].
[104] *Ibid* at [67].
[105] *Ibid* at [68].

human rights which precludes their taking the particular juridic form we would recognise and associate with common law claims. This is an intriguing though also frustrating position to take as it leaves the scope and application of the duty to investigate somewhat indeterminate. Unsurprisingly, neither appellant nor respondent counsel are particularly happy with it. Phillippa Kaufmann QC, counsel for the claimants, attempts to bring clarity to matters by positing a tripartite classification of investigative obligations to which particular features apply. She distinguishes between a '*systems* duty - the State's duty to introduce and maintain a judicial system that includes process for the investigation of actual or alleged events … an *adjectival* duty triggered only where there is an arguable case that the State itself has violated Articles 2, 3 or 4 … and a *criminal investigative* duty – requiring the effective investigation of conduct sufficiently grave to meet the threshold of Article 2, 3 or 4 whether or not perpetrated by State agents'.[106] Her primary purpose in so doing is to contain the reach of the domestic authorities which the MPS invoke in support of their contention that the duty to investigate is confined to situations in which the state is complicit.[107] These decisions, she suggests, do not purport to address the 'criminal investigative duty'.[108]

Laws LJ is as unsympathetic to Ms Kaufmann's submissions as he is to those of the MPS. We are thus confronted with two contrasting conceptual approaches to the evolving jurisprudence: that of both counsel, seeking to confer upon the duty to investigate clear and determinate features permitting, inter alia, some kind of categorical ordering, and that of the Court, which resists formal taxonomies and the imposition of too rigid a doctrinal frame, preferring instead to conceive of the duty to investigate as contextually prefigured. *Allen v Chief Constable of Hampshire Constabulary*[109] is of central importance here. *Allen* essentially turned on the extent of the police duty to investigate acts of harassment carried out by someone who happened to be a police officer. This factual wrinkle complicated matters as it raised the question whether the state was directly complicit in an alleged Article 3 breach (via the acts of the police officer) or whether the police merely failed

[106] *Ibid* at [38].
[107] See text above accompanying nn 83 to 89.
[108] Ms Kaufmann actually puts these arguments in relation to ground (b) above but they apply generally to the issue of scope and application of the investigative duty (or as Ms Kaufmann maintains, duties). Laws LJ summarises these arguments in *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [38-40].
[109] [2013] EWCA Civ 967.

adequately to investigate acts carried out by a private party. In the event, the Court of Appeal determined the latter, proceeding to uphold a first instance judgment striking out the Article 3 claim. According to Mr Johnson, this lends support for his argument that the scope of the investigative duty in cases where the alleged harm has been perpetrated by a private party is very narrow, amounting to no more than a requirement to ensure that available enforcement procedures existed to secure citizens' Article 3 rights.[110] Ms Kaufmann on the other hand approaches the difficulty she perceives *Allen* to present by isolating the 'systems duty' from the 'criminal investigative duty' and/or arguing that in so far as *Allen* supported the proposition that her criminal investigative duty did not apply to cases in which the State was not complicit, it was incorrect.[111]

Laws LJ adopts neither stance. He sees in the language of Gross LJ in *Allen* the same loosely bound approach to the duty to investigate as he himself favours, 'I have referred to a sliding scale; Gross LJ employed the metaphor of a spectrum. The idea plainly is the same… *Allen*'s case supports the application of a single principle of varying degrees of rigour, which as I have suggested represents the true sense of Article 3's investigative duty'.[112] Which of the three interpretations of *Allen* is correct? In truth Gross LJ's comments on the scope of the investigative duty are a little confusing, particularly on the question of whether and when the scope of the investigative duty extends beyond cases in which the State is not complicit.[113] Clearly, however, domestic jurisprudence is moving towards a position which recognises the duty varies depending on context; it is, as the judges repeatedly assert, fact-sensitive. Laws LJ's sliding scale arguably accommodates what is still an evolving view more accurately and certainly more flexibly than the creation of distinct categories. Moreover - although this point does not emerge from Law LJ's judgment - *Allen* and *D* are factually quite different; specifically *D* concerns not just operational inadequacies in a one-off criminal

[110] Mr Johnson relied in particular on the comments of Gross LJ in *Allen v Chief Constable of Hampshire Constabulary* [2013] EWCA Civ 967 at [43 & 44] considered by Laws LJ in *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [59-61].
[111] *Ibid*.
[112] *Ibid* at [60-61].
[113] For example, at [43], Gross LJ's text suggests an approach to the application of the duty to investigate which is graduated and contextual; but at [44] he quotes with approval from the judgment of Rix LJ in *R(AM) v Secretary of State for the Home Department* [2009] EWCA Civ 219 that: 'In the absence of state complicity the essential obligation is only to provide a system under which civil wrongs may be remedied in litigation or criminal wrongs investigated or prosecuted..' (ibid at [29] cited by Gross LJ in *Allen v Chief Constable of Hampshire Constabulary* [2013] EWCA Civ 967 at [44]. This is essentially the claim relied upon by Mr Johnson QC.

investigation, it also raises systemic issues, that is, issues which challenge the integrity of the investigative *system* in the context of crimes of sexual violence. For this reason (among others) the insistence upon a tight typology of investigative duties, as posited by Ms Kaufmann, may be unnecessarily restricting.

In any event, having dispelled all efforts to create a formal taxonomy of duties to investigate, Laws LJ quickly disposes of the appellant's key claim that there has been no breach of duty on the facts, drawing extensively from the analysis of Green J in the High Court in which multiple, serious investigative failings in both D and V's cases are painstakingly documented.[114] Thus is the MPS appeal resoundingly dismissed in a judgment which combines grand aspirations with tight technical analysis, supporting Green J's initial holding that by virtue of their obligation under section 6 HRA, the police have a duty to investigate, in an efficient and reasonable manner capable of leading to the identification and punishment of the perpetrator, suspected Article 3 violations; and that on the facts, that duty has been well and truly breached.

FUTURE(S) OF THE DUTY TO INVESTIGATE?

The most significant feature of *D* is that it provides a remedy where tort law has consistently denied one, certainly in a British context.[115] Will it however survive? There are two immediate threats; one is the Government plan to repeal the HRA. As things stand, that Act forms the legal hook upon which the claim in *D* hangs. What happens to rights recognised under the HRA if the Act is abolished? The duty to investigate will of course still exist as a matter of Article 3 ECHR jurisprudence; but will a claimant once again be reduced to working her expensive way through the domestic courts before turning to Strasbourg for

[114] *Ibid* at [70-77].

[115] A number of other jurisdictions have recognised a police duty to protect and/or investigate in relation to botched rape/sexual assault investigations relying on tort law and /or State-based constitutional rights. See eg *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (Ont Ct (gen Div)) (right to sue in negligence and under the Canadian Charter of Human Rights and Fundamental Freedoms); *Carmichele v Ministers of ⌋Safety and Security, Justice and Constitutional Development* 2001 (4) SA 938 (CC) and *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) (police and prosecutors' failure to protect could constitute a breach of State obligations to uphold rights enshrined in the South African Constitution); and most recently, *LM v Commissioner of An Garda Síochána and others* [2015] IESC 81 (Supreme Court allowed appeal against successful striking action and directed that claims brought by rape victims against the police based on negligence and/or violation of human rights should proceed to trial).

relief? Much depends upon what, if anything, the Government put in place of the HRA. The stated intent is to 'put the text of the original Human Rights Convention into primary legislation'[116] as well as to 'clarify Convention rights… [to] ensure they are applied in accordance with the original intentions for the Convention and the mainstream understanding of these rights'.[117] This is accompanied by a strongly articulated desire to distance British human rights law from any Strasbourg influence and, as the duty to investigate is, first and foremost, a product of that Court, its future status in domestic law must remain questionable.

An additional threat to the durability of *D* is overruling on appeal. At the end of February 2016, the Supreme Court granted the MPS permission to appeal, with a hearing provisionally scheduled for Spring 2017. The grounds of appeal are

> (1) Article 3 is not engaged by ill-treatment to which the State is neither a party nor complicit and/or (2) the right to investigation ancillary to Article 3 is confined in the case of non-State actors to having put in place the necessary structure but does not extend to the operational context of an individual enquiry into a particular alleged crime.[118]

One assumes appellant arguments will focus on the scope of the duty to investigate within a domestic context as clearly the argument that Article 3 is not engaged by ill-treatment to which the State is neither party nor complicit cannot be sustained as a matter of European Convention law.[119] The focus therefore is likely to be upon the extent of domestic incorporation of the duty, with appellant counsel striving to contain such incorporation by distinguishing between cases in which the State is or is not directly involved and, in the latter context, limiting the scope of the investigative duty to a requirement to introduce and maintain an effective system of judicial investigation. Respondent counsel is likely to counter this approach by inviting the Supreme Court to affirm the existence of distinct duty

[116] Conservative Party (2014) *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Law* (https://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf. [last accessed 11th April 2016].
[117] *Ibid*.
[118] Copy of Supreme Court order kindly provided by Jeremy Johnson QC.
[119] See eg *MC v Bulgaria* [2005] 40 EHRR 20.

categories and to consider the case before them as a manifestation of the 'criminal investigative duty' (understood to include a duty to conduct an effective criminal investigation 'in practice') rather than the 'systems duty' posited by the appellants.[120]

There is merit to this approach – judges do like categories and they can perform useful service. However, I would question whether such efforts to tailor the authorities to a clear and workable typology are sustainable, given the relatively early stage of domestic development of the investigative duty. I also share Laws LJ's view that the boundaries of these allegedly distinct duties are 'permeable' and appropriately so.[121] As noted above, a particular feature of *D* is that the facts reveal both systemic and operational investigative failures; failures which go both to the State duty to introduce and maintain a judicial *system* of investigation (encompassing criminal and civil proceedings) and to the duty requiring an effective *criminal investigation* where suspected Article 3 violations are involved. It is far from clear how the judicial finding of both systemic and operational failures in the Worboys' investigation[122] maps onto Ms Kaufmann's three duty categories. Mr Johnson's attempts to tame the investigative duty via the articulation of clear governing 'principles' is also less than effective.[123] Unlike rules, which are binary in their application, principles are scalar; they carry variable weight and lack formal dispositive effect. We have seen how quick Laws LJ is to rebrand Mr Johnson's principles as 'factors',[124] further weakening their power and allowing their easy alignment within the 'sliding scale' framework he prefers. Ultimately, at the heart of this issue is the extent to which the Supreme Court is likely to treat the arguments underpinning the grounds of appeal as containing rather than mediating the terrain within which the investigative duty operates. In this respect I incline towards Laws LJ's more flexible and nuanced approach because it facilitates a desirable balance between a navigable framework of legal norms and an aspirational project which, by its nature, resists containment.

[120] See summary of respondents' arguments in *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at 172.
[121] *Ibid* at [42].
[122] *Ibid* at [244-284] (systemic) and [285-298] (operational).
[123] See text above accompanying n 99.
[124] *D v Commissioner of Police for the Metropolis* [2016] QB 161(CA) at [50].

One further factor likely to influence Supreme Court deliberations is the introduction of intervenors' arguments. Cases like *D* and *Michael* inevitably raise issues which reach far beyond the concerns of the individual parties involved, inviting strategic interventions from activist and civil society organisations. The Worboys case broke at the end of a decade of vociferous public debate about the perceived limitations of the criminal justice system in general, and police practices in particular, regarding the investigation and prosecution of rape complaints.[125] Just as *Michael*[126] acted as a clarion cry, mobilising activists seeking to improve the way in which the police approach domestic violence, *D* too is likely to attract similar kinds of engagement. Intervenors in *Michael* included Refuge, Liberty, and Cymorth y Ferched Cymru (Welsh Women's Aid) and clearly their submissions, in particular those of Karon Monaghan representing Refuge, shaped the judgment of Court, compelling judicial engagement with the broader context of endemic domestic violence and systemic criminal justice failures within which Ms Michael's tragic case was situated.[127]

Organizations applying to intervene in *D* include Rape Crisis of England and Wales, End Violence Against Women, and Southall Black Sisters, amongst others.[128] The Home Secretary is also expected to intervene; one assumes that the concern here will be to protect the police from an undesirable burden of liability in the context of their investigative and crime-suppressing functions. Might the spectre of public policy arguments, historically associated with the common law, re-materialize in a HRA context? Recall that one of the main reasons why the common law has resisted the imposition of a duty of care on the police in circumstances such as *D* derives from a judicial concern, repeatedly rehearsed in the case law, that the threat of liability will adversely influence the way the police carry out their responsibilities, imposing unwarranted financial and administrative burdens which will detract from the ability to carry out core police functions.[129] This 'public policy' concern, originally finds expression in Lord Keith's judgment in *Hill v Chief Constable of West*

[125] See above, nn 1 & 2.
[126] *Michael v Chief Constable of South Wales*, [2015] UKSC 2.
[127] In his judgment Lord Toulson, who gave the majority judgment, makes repeated reference to Ms Monaghan's submissions, *ibid* at [17-29]; he also directly mentions a recent HMIC report documenting police failures in a domestic violence context (*Everyone's Business: Improving the Police Response to Domestic Abuse* (London: HMIC, 2014).
[128] Information provided by Phillippa Kaufmann QC, April 7th 2016.
[129] For a an elaboration of these concerns, see in particular judgment of Lord Steyn in *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24 at [30].

Yorkshire[130] and has, with few exceptions, been uncritically reproduced by otherwise more discerning judicial minds ever since.[131] As Tofaris and Steel point out, there is little concrete evidence to support judicial suppositions about the effect on policing posed by the threat of liability; their concerns are speculatively rather than empirically derived.[132] What empirical evidence there is does not support judicial fears. For example, in a study of claims against local authorities regarding accidents caused by poor road maintenance, Halliday et al found no evidence that the threat of liability unduly inhibited public functions and concluded that local authorities tended to be 'risk aware as opposed to risk averse'.[133]

If resource-based public policy arguments are raised in the Supreme Court, it is likely they will be robustly contested, particularly by organizations consistently expressing concern about how the police handle rape complaints. Put simply, insofar as civil liability might indeed induce changes in policing practice, many would argue this is entirely to be desired, that public policy is served rather than impeded by such developments. Organizations seeking to intervene in *D* include those who have long campaigned for changes in the way the police approach the investigation of rape and other crimes of sexual violence and such concerns now prominently feature in public policy discussion around criminal justice.[134] The perceived public policy challenge is how to *embed* policies which are agreed but far from inscribed in day-to-day police practices. Dame Elish Angiolini, assessing a range of studies as part of her recent review of the investigation and prosecution of rape in London, concluded: 'A key finding [of the studies] was the consistent approval of the policies applied to the investigation and the prosecution of rape, and the identification of an *inability to implement those same policies* comprehensively and successfully'.[135]

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[130] *Hill v Chief Constable of West Yorkshire Police* [1989] 1 AC 53 and above, n 11.

[131] Lord Steyn in *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24 is among the few judges to acknowledge that the liability fears expressed in *Hill* are based on assumptions which are socially contentious although he goes on to endorse (at [30]) a narrow articulation of the policy concerns first aired in *Hill* (see further above n 11).

[132] S Tofaris & S Steel 'Police Liability in Negligence for Failure to Prevent Crime: Time for a Rethink' University of Cambridge Legal Studies Research Paper Series, No 39/2014. Available at SSRN: http://ssrn.com/abstract=2469532 or http://dx.doi.org/10.2139/ssrn.2469532

[133] S Halliday, J Ilan, & C Scott 'The Public Management of Liability Risks' (2011) 31 OJLS 527, p 527.

[134] See above, nn 1 & 2.

[135] Angiolini, above, n 1, para 8 (my emphasis). As Baroness Stern succinctly put it five years previously: 'The policies are right; the implementation is patchy and must be improved' (Stern, above n 1, p 8).

If public policy, or some variation thereof, is raised on behalf of the MPS position, it risks the introduction of a mountain of evidence by intervenor organizations strongly supporting a claim that serious systemic issues exist in the police handling and disposition of rape complaints; such evidence inevitably problematizes unsubstantiated assertions that protecting the police from liability is always in the public interest. Moreover, although most judges to date have happily subscribed to the view that the threat of tort liability against the police will lead to bad outcomes such as defensive policing and the misuse of public resources, some have begun to question this position. Writing extra-judicially in 2010, in the wake of another failed tort claim against the police brought by a domestic violence victim,[136] Lord Bingham strongly criticised the judicial invocation of fears of defensive policing, challenging the view that influencing the way in which the police handled domestic violence cases was necessarily to be avoided.[137] Indeed, his Lordship speculated that the imperative to avoid liability might well have led the police to provide the unfortunate claimant in *Smith* with a better level of protection than he received: 'it is not easy' Lord Bingham observed 'to see how such defensive conduct could have done other than fulfil the function of the police in preventing the commission of crime and protecting the safety of the public'.[138] In her dissenting judgment in *Michael*, Lady Hale makes not dissimilar comments, suggesting that expanding the scope of liability 'might conceivably lead to some much-needed improvements in the [police] response to threats of serious domestic abuse'.[139] Lord Toulson, speaking for the majority in *Michael*, is more sceptical. He assert that there is no evidence that civil liability will improve the policing of domestic violence: 'the court has no way of judging the likely operational consequences of changing the law of negligence…' [140]

What is interesting about this comment is that the boot has suddenly shifted to the other foot. Judges can no longer reiterate unchallenged the view that civil liability will adversely affect policing. Rather they are now being required to respond to the assertion that liability will confer beneficial effects. In a relatively short time, and notwithstanding the ultimate judicial rejection in *Michael* of the claim that the police owe a duty of care to a domestic

[136] *Smith v Chief Constable of Sussex Police* [2008] UKHL 50.
[137] T Bingham 'The Uses of Tort' (2010) 1 *Journal of European Tort Law* 1.
[138] *Ibid*, p 12.
[139] *Michael v Chief Constable of South Wales*, [2015] UKSC 2 at [198].
[140] Ibid at [121]. For a robust critical assessment of judicial arguments against the imposition of a duty of care, see Tofaris & Steel, above n 132.

violence victim who has sought their assistance,[141] the parameters of the discourse have shifted significantly, the weight of legal argument tilting away from a position which has so long shielded the police from the consequences of poor policing of crimes of sexual and domestic abuse.

What we are witnessing in this cumulative line of cases, but particularly in *D* and *Michael* where significant third party interventions are involved, is the harnessing of public processes of legal argumentation to broader forms of social and political activism concerned with bringing about social change. The courtroom is being repositioned as a forum for airing concerns about inadequate policing in the context of gender-inflected crimes of violence and abuse. *D* is remarkable here for its sheer discursive potency. The case powerfully illustrates the potential of law as a site of contestation in which the political stakes extend well beyond the interests of the immediate parties. Litigation provides a crucial space for public discourse with the power to shape and inform public attitudes and beliefs. Experience in other jurisdictions suggests that a significant legacy of this type of litigation is precisely its capacity to advance public dialogue about the critical issues at stake. For example, commenting on *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*,[142] a Canadian case in which the victim of a serial rapist successfully sued the Toronto police both in negligence and under the Canadian Charter of Rights and Freedoms, the claimant's legal counsel, Sean Dewart, has asserted that *Doe* was a 'pivotal factor in the continuum of events that has brought about [a] change in public attitudes'.[143]

In this sense law can sometimes serve as a tool – albeit the effectiveness of which is variable- for bringing about change in the behaviour of public bodies where other bureaucratic measures have failed. Cases like *D* signal a convergence of public legal norms with private remedial mechanisms in the context of questions about the accountability and legitimacy of state actions.[144] Such strategic deployments of law pertain directly to debates about the character of civil obligations, highlighting a growing divergence in the role and

[141] Although it must not be forgotten that the claim under Art 2 ECHR and the HRA has been allowed to proceed, see above n 27.
[142] (1998), 39 OR (3d) 487 (Ont Ct (gen Div)).
[143] S Dewart '*Jane Doe v Toronto Commissioners of Police*: A View from the Bar' in Sheehy, n 4 above, p 50.
[144] See further Epp above n 4 and also S Halliday, J Ilan & C Scott 'Street-level Tort Law: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 MLR 347.

positioning of private law norms on the one hand and human principles on the other. Within tort scholarship, for example, there is a recurring debate about whether civil law obligations ought to be viewed and deployed instrumentally as a vehicle for the promotion of wider social goals, with the predominant trend being against instrumentalism in favour of a narrow conception of the role and purpose of tort in terms of corrective justice.[145] Such a view, which tends to meet approval in the courts, encourages a perception of tort and human rights as pulling in different directions[146] and contrasts with approaches which advocate greater harmony between human rights and common law norms.[147] *D* is located directly in the path of these tensions; indeed, it may credibly be argued that the claimants owe their successful outcome precisely to the development of this remedial cleavage between tort law and human rights.[148] Within this broader frame of strategic engagement with law, whether or not a case is won or lost, is not necessarily the most significant marker of litigation success. In offering a final evaluation of the success or failure of the litigation in D, these broader considerations should not be overlooked.

[145] See eg E Weinrib *The Idea of Private Law.* Cambridge (Ma: Harvard University Press, 1995); A Beever, Allan *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007); Stevens above n 92.
[146] R Bagshawe 'Tort Design and Human Rights Thinking' in D Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge: CUP, 2011) 110; F Du Bois 'Human Rights and the Tort Liability of Public Authorities' (2011) 127 LQR 589.
[147] See eg C McIvor 'Getting Defensive about Police Negligence: the *Hill* Principle, the Human Rights Act and the House of Lords' (2010) CLJ 133. In contrast to the English courts, the South African Constitutional Court, in a not dissimilar context (suit against police and prosecutors for failure to prevent a brutal assault carried out by a serious sexual predator while released on bail) stressed the obligation to develop the common law in ways which 'reflect the spirit, purport and objects of the [South African] Bill of Rights': *Carmichele v Ministers of Safety and Security, Justice and Constitutional Development* 2001 (4) SA 938 (CC) at [36].
[148] See text accompanying nn 95-97 above.